

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)	
)	
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation Provisions)	
Of the Telecommunications Act of 1996)	
The Illinois Public Telecommunications Association's,)	
Petition for A Declaratory Ruling Regarding the Remedies)	
Available for Violations of the Commission's Payphone)	
Orders)	

**ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION
PETITION FOR A DECLARATORY RULING**

The Illinois Public Telecommunications Association (“IPTA”), on behalf of its members, hereby petitions the Federal Communications Commission (“Commission”) pursuant to Sections 1.1 and 1.2 of the Commission’s Rules, 47 C.F.R. §§ 1.1, 1.2, for the Commission to resolve an outstanding legal controversy and to remove an uncertainty with respect to the enforcement of the Commission’s orders regarding the charges for network services provided to payphone service providers pursuant to 47 U.S.C. §§ 201, 202, and 276.

The Commission previously held under Sections 201, 202, and 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹ (“Federal Act”) (1) that no later than April 15, 1997 payphone service providers (“payphone providers”, or “PSPs”) were to receive local telephone network services at cost-based rates that complied with the Commission’s new services test, and (2) that incumbent local exchange carriers (“ILECs”) would be eligible to receive what is commonly referred to as dial-around compensation provided that, as a condition precedent, their rates for local telephone network services provided to

¹ 47 U.S.C. §§ 201, 202, and 276.

competing payphone providers met the new services test requirement.² In a number of proceedings before state public utility commissions (“state PUCs”) acting to implement the Commission’s orders, it has been established that certain incumbent local exchange carriers failed to comply with the Commission’s Payphone Orders. More particularly, the Illinois Commerce Commission (“ICC”) in ICC Docket No. 98-0195 found that the rates charged by Illinois Bell Telephone Company d/b/a SBC Illinois (“SBC Illinois”), and that the rates charged by Verizon North, Inc., and Verizon South, Inc. (collectively “Verizon”), to competing payphone providers failed to meet the new services test; and the record further reflects that since April 15, 1997 SBC Illinois and Verizon nevertheless have collected hundreds of millions of dollars in dial-around compensation based on their false self-certification that the new services test had been met.

Where an ILEC has charged PSPs rates that fail to meet the new services test as ordered by the Commission, some state PUCs have issued orders for refunds to the PSPs for the amount the charged rates exceeded rates complying with the new services test, while other state PUCs, including the ICC, have failed to order refunds or reparations after finding similar violations of the Commission’s orders. There exists a significant outstanding legal controversy and uncertainty as to the available remedies for established violations of the Commission’s Payphone Orders.

² *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶146-147 (1996) (“*First Payphone Order*”), and Order on Reconsideration, 11 FCC Rcd. 21233 (1996), ¶¶131, 163 (“*Payphone Reconsideration Order*”) *aff’d in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com’n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) (“*Bureau Waiver Order*”); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) (“*Bureau Clarification Order*”) (collectively “*Payphone Orders*”).

The IPTA, on behalf of its members, respectfully petitions the Commission for a declaratory ruling as to the consequences and remedies available for an ILEC's violation of the Commission's Payphone Orders requiring the provision by April 15, 1997 of network services to PSPs at cost-based rates that satisfy the new services test. The IPTA further requests a specific Commission declaratory ruling: 1) that the PSP members of the IPTA are entitled to refunds or reparations from SBC of the amounts SBC charged said IPTA members from April 15, 1997 through December 13, 2003, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test; 2) that the PSP members of the IPTA are entitled to refunds or reparations from Verizon of the amounts Verizon charged said IPTA members from April 15, 1997 through January 31, 2002, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test; 3) that the ICC decision denying the IPTA members refunds or reparations is inconsistent with the Commission's Payphone Orders and that the ICC should re-evaluate its denial of refunds or reparations to ensure compliance with the Commission's rulings; 4) whether SBC Illinois and Verizon were eligible to receive dial-around compensation for access code and toll free calls originating from their payphones on or before December 13, 2003 and January 31, 2002, respectively; and 5) for such other relief arising from the facts in ICC Docket No. 98-0195 as deemed necessary to enforce the Commission's Payphone Orders.

I. BACKGROUND

The IPTA is an Illinois not-for-profit trade association representing over 70 independent payphone providers in Illinois. SBC Illinois is an incumbent local exchange carrier in Illinois and a Bell Operating Company as defined in 47 U.S.C. §153(4). Verizon North, Inc., formerly

GTE North, Inc., and Verizon South, Inc., formerly GTE South, Inc., are incumbent local exchange carriers in Illinois.

On September 20, 1996, the Commission found that incumbent local exchange carriers, including SBC Illinois and Verizon, were required under Sections 276(a) and 276(b)(1)(C) of the Federal Act³ to provide access to network services for payphone providers at cost-based rates that comply with the Commission's new services test. These carriers were required to file tariffs by which this compliance would be effective no later than April 15, 1997.⁴

The Commission also found that under Section 276(b)(1)(A)⁵ SBC Illinois and Verizon would be eligible to receive compensation for completed toll free and access code calls that originated from their respective payphones ("dial-around compensation"). To ensure compliance with the Commission's payphone regulatory scheme, the Commission held that SBC Illinois and Verizon would not become eligible to receive dial-around compensation for their payphones until they have in effect cost-based rates for services to payphone providers that comply with the Commission's new services test as a condition precedent to receiving dial-around compensation. However, the Commission permitted SBC Illinois and Verizon to self-certify that they were in compliance with the new services test to begin receiving compensation.⁶

SBC Illinois and Verizon each self-certified, on May 19, 1997 and May 21, 1997, respectively, that it was providing cost-based rates for network services to payphone providers that met the Commission's new services test and was entitled to receive dial-around compensation for completed calls from its payphones. Once they certified compliance with the

³ 47 U.S.C. §§276(a) and 276(b)(1)(C).

⁴ *First Payphone Order*, ¶¶146-147 (1996); *Payphone Reconsideration Order*, ¶¶131, 163; *Bureau Waiver Order*, ¶¶2, 30-33, 35; *Bureau Clarification Order*, ¶ 10.

⁵ 47 U.S.C. §276(b)(1)(A).

⁶ *Payphone Reconsideration Order*, ¶ 131. (SBC Illinois and Verizon were required to also satisfy other conditions not in issue here.)

Commission's new services test, other carriers were not permitted to refuse making dial-around compensation payments to either SBC Illinois or Verizon, even though it was contested that their network service rates still did not comply with the new services test requirement. The Commission held that, although self-certification would not substitute for actual compliance in meeting the dial-around compensation precondition, failure to comply with the new services test could only be determined by a proceeding before the Commission or a state commission, such as the ICC.⁷

On May 8, 1997, even before such self-certification, the IPTA, on behalf of its members, filed a petition with the ICC asserting that SBC Illinois and Verizon were charging network service rates to IPTA payphone providers in excess of the cost-based rates required by the new services test. Part of the relief requested by the IPTA was for a refund to its members of any amounts charged them by SBC Illinois or Verizon in excess of cost-based rates that complied with the new services test. In response to the IPTA petition, the ICC opened an investigation to determine if the network service rates of SBC Illinois and Verizon to payphone service providers were cost-based in compliance with the new services test.⁸

During the course of the ICC investigation, the Commission amended its earlier orders and held that the new services test requirement under Sections 276(a) and 276(b)(1)(C) did not apply to incumbent local exchange carriers other than the Bell Operating Companies, as defined by Section 153(4)⁹. However, the Commission found that state commissions may require non-

⁷ *Bell Atlantic-Delaware v. Frontier Communications Services*, DA 99-1971, ¶28 (Com. Car. Bur. released September 24, 1999).

⁸ *Illinois Public Telecommunications Association, an Illinois not for profit corporation: Petition to determine whether Illinois local exchange carriers are in compliance with the Illinois Public Utilities Act and Section 276 of the Communications Act of 1934*, ICC Docket No. 97-0225, Final Order (Dec. 17, 1997) initiating *Illinois Commerce Commission Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-0195.

⁹ 47 U.S.C. § 153(4).

Bell incumbent local exchange carriers to comply with the new services test under state authority.¹⁰ As such, the Verizon local exchange operations in Illinois that formerly belonged to GTE would no longer be subject to the new services test under Section 276.

On November 12, 2003, the ICC ruled in the Illinois investigation. The ICC found that SBC Illinois' network service rates were not in compliance with the new services test. Pursuant to the ICC order, SBC Illinois filed a new tariff with reduced rates for network services provided to payphone providers. SBC Illinois' tariff became effective December 13, 2003. The ICC further held that Verizon is required under Illinois law to provide payphone service providers with access to network services under cost-based rates that comply with the new services test, and proceeded to find that the Verizon rates were not in compliance with the new services test.¹¹ Neither SBC Illinois nor Verizon appealed this determination. The ICC denied the request of the IPTA for refunds for the differences in the rates charged by SBC Illinois and Verizon and the cost-based rates required by the new services test on the basis that this would constitute retroactive ratemaking.¹² The IPTA has appealed this denial of refunds or reparations to the Illinois Appellate Court.

II. ENFORCEMENT OF COMMISSION ORDERS

In a series of orders, the Commission repeatedly held that local exchange network services provided to payphone providers must be offered at cost-based rates that satisfy the new

¹⁰ *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, FCC 02-25, 17 FCC Rcd. 2051, ¶ 31 (Jan. 31, 2002) (“*Wisconsin Order*”) *aff’d sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 rehearing and rehearing en banc denied (Sep. 22, 2003).

¹¹ *Illinois Commerce Commission Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-0195, Interim Order, p.46, Finding 20 (November 12, 2003) (“*ICC Payphone Order*”).

¹² *Ibid*, p.43.

services test, effective no later than April 15, 1997.¹³ Secondly, in its own words, the Commission *emphasized* that a local exchange carrier was *not eligible* to receive dial-around compensation like other PSPs until the carrier was in actual compliance with the requirement for providing network services to such PSPs at cost-based rates.¹⁴ The determination of whether a carrier was in actual compliance rested with the state regulatory commission.¹⁵

In ICC Docket No. 98-0195, the ICC determined that neither SBC Illinois nor Verizon rates satisfied the new services test.¹⁶ SBC Illinois and Verizon had overcharged PSPs millions of dollars in excessive rates since April 15, 1997, while collecting hundreds of millions of dollars in dial-around compensation for which they were not eligible, both in direct violation of the Commission's Payphone Orders. Nevertheless, the ICC rejected the IPTA's request for a refund of the difference between the illegal rates charged its PSP members and the cost-based rates required by the new services test. The ICC order failed to enforce either of the Commission's requirements, i.e. 1) that cost-based rates to PSPs be effective by April 15, 1997, and 2) that SBC Illinois and Verizon were not eligible for dial-around compensation until in actual compliance with the cost-based rate requirement, and is inconsistent with the Commission's payphone regulatory scheme to implement Section 276. The IPTA respectfully requests that the Commission to issue a declaratory ruling that the IPTA PSP members are entitled to a refund with interest, going back to April 15, 1997 of the difference between the excessive rates charged and those required by the new services test and such other relief the Commission deems necessary. Such reparations are required to place the IPTA PSP members in the position they

¹³ *Payphone Order*, ¶¶146-147 (1996); *Payphone Reconsideration Order*, ¶¶131, 163; *Bureau Waiver Order*, ¶¶ 2, 30-33, 35; *Bureau Clarification Order*, ¶ 10.

¹⁴ *Ibid.*.

¹⁵ *Bell-Atlantic Delaware*, ¶ 28.

¹⁶ *ICC Payphone Order* at 46, Finding 20.

effectively should have been had SBC Illinois and Verizon complied with the Commission's orders.

Two explicit directives of the Commission are central to resolution of the instant matter. First, the Commission required SBC Illinois and Verizon to provide network services to payphone providers at cost-based rates that satisfied the new services test, which rates "must be effective no later than April 15, 1997."¹⁷ The ICC has now determined that neither SBC Illinois nor Verizon provided said services at rates that complied with the new services test.¹⁸

Second, the Commission emphasized that neither SBC Illinois nor Verizon were eligible under Section 276 to receive dial-around compensation for calls originating from their payphones until each provided rates that satisfied the new services test as a condition precedent. Although the ICC Finding 20¹⁹ establishes that neither carrier had satisfied this prerequisite, the record reflects that SBC Illinois and Verizon have received hundreds of millions of dollars in dial-around compensation since April 15, 1997 based on their false self-certification of compliance.

Verizon's obligation to provide cost-based rates to PSPs was more limited than that of SBC Illinois. In the initial orders, the Commission required all ILECs, including GTE, Verizon's predecessor in Illinois, to provide payphone providers with cost-based rates. In the *Wisconsin Order*, the Commission held that under Section 276(b)(1)(C) it only had jurisdiction to require the Bell Operating Companies to provide rates that satisfied the new services test.²⁰ As such,

¹⁷ *Payphone Reconsideration Order*, ¶ 163.

¹⁸ *ICC Payphone Order* at 46, Finding 20.

¹⁹ *ICC Payphone Order* at 46, Finding 20.

²⁰ *Wisconsin Order*, ¶ 31; *New England Public Communications Council*, *supra*.

the Commission could not require Verizon, in Illinois, to provide cost-based rates under Section 276(b)(1)(C).

However, the Commission's jurisdiction over the provision of dial-around compensation arises under Section 276(b)(1)(A), which does provide for the Commission's jurisdiction over Verizon's Illinois operations. Pursuant to its implementation of Section 276(b)(1)(A), the Commission required Verizon to provide cost-based rates to payphone providers in Illinois as a prerequisite for receiving dial-around compensation. This prerequisite for payphone compensation was never appealed and remained binding on Verizon's Illinois operations from April 15, 1997 until removed by the Commission's *Wisconsin Order* on January 31, 2002.

As such, Verizon's eligibility to receive dial-around compensation from April 15, 1997 to January 31, 2002 was conditioned on Verizon's actual compliance with the prerequisite of providing cost-based rates to PSPs. Whereas Verizon collected dial-around compensation during this time period, it is required to have provided PSPs with rates that satisfied the new services test.

Not only did the Commission establish a federal scheme for implementing Section 276, but in its own words it was emphatic about how it was to be implemented. The Commission recognized that LECs might have an incentive to charge competing payphone providers unreasonably high prices for network services. Therefore, the Commission specifically found that network services provided to payphone providers must satisfy the new services test for cost-based rates.²¹ It separately found that ILECs, such as SBC Illinois and Verizon, could receive dial-around compensation for calls originating from their payphones one year from the effective

²¹ *First Payphone Order*, ¶¶146, 147.

date of the rules.²² On reconsideration, the Commission amended the date by which the ILECs could receive dial-around compensation, granting their request for an earlier commencement of compensation if they first satisfied the requirements imposed on them.

The RBOCs, BellSouth, and Ameritech request that the Commission clarify that the LECs be allowed to eliminate subsidies and reclassify their assets, and, as a result, be eligible to receive payphone compensation, by April 15, 1997, as opposed to on that date. We clarify that the LECs may complete all of the steps necessary to receive compensation by April 15, 1997.

* * *

We must be cautious, however, to ensure that LECs comply with the requirements we set forth in the Report and Order. Accordingly, we conclude that LECs will be eligible for compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276. LECs may file and obtain approval of these requirements earlier than the dates included in the Report and Order, as revised herein, but no later than those required dates. To receive compensation a LEC must be able to certify the following: . . . 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones);

Payphone Reconsideration Order, ¶¶ 130-131.

The Commission restated this requirement when reviewing the status of the ILECs compliance with the *Payphone Reconsideration Order* requirements as the April 15, 1997 deadline approached. It held that an ILEC would not be eligible for dial around compensation in any state where the ILEC failed to have cost-based rates in effect.

We *emphasize* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived herein, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. . . . As discussed above, LECs that have not complied with these requirements will not be entitled to receive compensation.

* * *

. . . The plain language of the Order on Reconsideration provides that state tariffs for payphone services must be cost-based, consistent with the requirements of Section 276, nondiscriminatory, and consistent with Computer III guidelines. . . .

²² *First Payphone Order*, ¶50.

* * *

. . . The intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.

Bureau Waiver Order, ¶¶30 – 31, 33 (italics added).

When the ILECs requested certain waivers of the April 15, 1997 deadline for filing the cost-based tariffs, the Commission granted the extension on the condition that the payphone providers receive a refund or credit back to April 15, 1997 for any rates paid in excess of the required cost-based rates. The Commission again emphasized that the provisioning of cost-based rates remained a prerequisite to be eligible to receive compensation.

In the recent Bureau Waiver Order, we *emphasized* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines; . . .

Bureau Clarification Order, ¶10 (italics added).

When addressing the procedure to challenge a LEC's self-certification that it has complied with the Commission's Section 276 requirements, the Commission admonished that carriers could not engage in self-help. Once a LEC certified compliance it could begin receiving compensation. But the Commission again made it clear that certification did not substitute for actual compliance to be eligible for compensation. However, actual compliance is a determination that must be made by a commission.

We *emphasize* that a LEC's certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation.

Determination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction.

Bell Atlantic-Delaware, ¶28 (italics added).

Pursuant to the federal scheme established by the Commission, the IPTA brought the determination of SBC Illinois' and Verizon's compliance with the requirements set forth in the Payphone Orders to the ICC. The ICC determined that, despite SBC Illinois' and Verizon's self-certification to the contrary, neither provided rates to payphone providers that complied with the new services test. Furthermore, the record reflects that both have been receiving dial-around compensation since April 15, 1997 before they satisfied the prerequisites for eligibility. However, the ICC denied the request for refunds to the payphone providers for the difference between the rates paid and the cost-based rates required under the Commission orders on the theory that it would constitute retroactive ratemaking.

Retroactive ratemaking involves a prospective rate fixed by the Commission after a hearing. The rate is of a legislative quality and may not later subject the carrier to the payment of reparations upon a different Commission determination *as to the situation existing at the time the previous order was entered*.²³ It is undisputed that ICC Docket No. 98-0195 is the first ICC hearing conducted on either SBC Illinois' or Verizon's compliance with the requirements of Section 276. Rates set at earlier times for other reasons do not constitute a rate set by the Commission, or a state commission, after a hearing as to Section 276 compliance.

SBC Illinois and Verizon were not only free of any previous state or Commission order setting rates for network service provided to PSPs, they were under specific Commission orders to develop cost-based rates. These carriers established their own rates for Section 276 compliance. They self-certified that their rates were in compliance with Section 276, without

²³ *Arizona Grocery v. Atchison, T. & S. F. Ry Co.*, 284 U.S. 370, 390, 52 S.Ct. 183, 186 (1932).

any hearing, on May 15, 1997 and May 19, 1997, respectively. With respect to a rate set by a carrier, the Commission acts in an adjudicatory capacity and adjudication of the facts may involve reparations of an unlawful rate.²⁴ The filed tariff rate is the legal rate, but not the lawful rate if unreasonable. “The Act (gave) . . . the Commission the power . . . of determining the reasonableness of the published rate. If the finding on this question was against the carrier, reparation was to be awarded.”²⁵ Rates that are in direct violation of lawful Commission orders are per se unreasonable. The Commission’s requirement for cost-based rates was upheld by the Federal Court.²⁶

Although SBC Illinois’ and Verizon’s tariffed rates may have been the legal rates, they were not the lawful rates. There were not rates set by a commission after a hearing concerning the appropriate cost-based rates for network services to PSPs under the new services test. As of April 15, 1997, neither SBC Illinois nor Verizon was required to provide network services to PSPs according to any previous state commission order. It was just the opposite. Both SBC Illinois and Verizon were under this Commission’s orders to set cost-based rates effective April 15, 1997. Any and all previous orders of the ICC were expressly preempted.²⁷

SBC Illinois and Verizon set their own network service rates for payphones by their independent determinations of those rates with their respective May 19, 1997 and May 21, 1997 filings with the ICC. The United States Supreme Court explained that when the carrier makes its own rates, if the Commission’s adjudication finds the rates excessive, reparations are due.

As respects a rate made by the carrier, (the Commission’s) adjudication finds the facts, and may involve a liability to pay reparation.

²⁴ *Arizona Grocery*, 284 U.S. at 186, 52 S.Ct. at 390.

²⁵ *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 128-129, 110 S.Ct. 2759, 2767 (1990).

²⁶ *New England Public Communications Council, Inc.*, *supra*.

²⁷ *First Payphone Order*, ¶ 147.

* * *

(T)he great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Arizona Grocery Co., 284 U.S. at 388, 390, 52 S.Ct. at 186.

In ICC Docket No. 98-0195, the ICC reviewed the legal tariff rates set by SBC Illinois and Verizon for network services to PSPs and found them to be unlawful. Where the finding on this questions goes against the carrier, reparation is to be awarded to the PSP. The amount of reparation is the difference between the rates charged and the lawful cost-based rates required by the ICC after the hearing.

(I)t necessarily followed that upon a finding of unreasonableness an award of reparation should be measured by the excess paid . . .

Arizona Grocery Co., 284 U.S. at 385, 52 S.Ct. at 184; *in accord Maislin Industries, U.S., supra.*

The Commission has held at least four times that ILECs were required to have cost-based rates for PSPs in effect no later than April 15, 1997.²⁸ The Commission has further stated, and emphasized, at least five times that the ILECs are not eligible to receive dial-around compensation until they have cost-based rates for PSPs in effect.²⁹ Although both SBC Illinois and Verizon have violated these orders with unlawful rates, and at the same time collected dial-around compensation, the ICC denied the IPTA members any reparations for the unlawfully excessive charges. Such failure to enforce the emphatic holdings of the Commission allows both carriers to violate the Commission's Payphone Orders with impunity.

²⁸ *First Payphone Order*, ¶¶146-147 (1996); *Payphone Reconsideration Order*, ¶¶131, 163; *Bureau Waiver Order*, ¶¶2, 30-33, 35; *Bureau Clarification Order*, ¶ 10.

²⁹ *Ibid*; *Bell Atlantic-Delaware*, ¶ 28.

At least six other state commissions have entered orders issuing refunds when payphone rates have been found to be excessive under the new services test:

1. Michigan Public Service Commission (“MPSC”) Docket No. U-11756 – The MPSC order of March 16, 2004 found that, to the extent SBC Michigan and Verizon (GTE) rates exceeded the new services test rates since April 15, 1997, the excess must be returned to their payphone service provider customers with interest. The MPSC rejected SBC Michigan’s and Verizon’s argument that such refund violated the filed rate doctrine or the prohibition against retroactive ratemaking. Both carriers were required under federal and state authority to have rates comply with the new services test by April 15, 1997.
2. Tennessee Regulatory Authority (“TRA”) Docket No. 97-00409 – The TRA found that the COMMISSION intended for an affected party to be placed in the position he or she would have been if all the requirements established by the CO had been met on April 15, 1997. Interim Order dated February 1, 2001 at 26. As such, the TRA voted unanimously to require the LECs to pay as reimbursement any overpayment since April 15, 1997 adjusted to account for both inflation and the time value of money, equaling 6% interest annually. The TRA entered its final order adopting the parties’ proposed settlement of payphone access service rates on May 21, 2002. The final order was silent on the issue of refunds, thus not interfering with the previous determination in the Interim Order regarding refunds.
3. Kentucky Public Service Commission (“KPSC”) Administrative Case No. 361 – The KPSC found that the rates tariffed by BellSouth, Cincinnati Bell Telephone, and GTE (now Verizon) were in excess of the appropriate cost-based rates under the new services test. As such, the incumbent local exchange carriers were ordered to issue refunds or credits back to April 15, 1997.
4. South Carolina Public Services Commission Docket No. 97-124-C and Order No. 1999-284 – The SCPSC found that BellSouth’s payphone access services were overpriced under a new services test analysis and ordered BellSouth to reimburse the IPPs that purchased the services, including appropriate interest at the rate of 8.75% per annum, back to April 15, 1997.
5. Louisiana Public Service Commission (“LPSC”) Order No. U-22632 – The LPSC entered an order approving the terms of a stipulated agreement wherein the incumbent local exchange carriers agreed to issue refunds for the cumulative period from April 15, 1997 through the effective dates of the revised tariffs lowering the payphone access tariff rates.
6. Pennsylvania Public Utility Commission (“PPUC”) Docket No. R-0097386700001 – The PPUC adopted and approved the terms of a stipulated agreement wherein Bell Atlantic–Pennsylvania would established new rates for payphone access services and provide a refund dating back to April 15, 1997.

The ICC's order established that SBC Illinois and Verizon had falsely certified compliance with the new service test rate requirements, and that both were receiving dial-around compensation before they were eligible under the federal regime. Yet the ICC has failed to enforce these Commission orders or to provide a remedy for the violations of the PSPs' federal rights. This order stands in contradiction to the remedies ordered by other state commissions for similar violations of the same federal rights.

Although all PSPs have the same rights emanating from the same Federal Act, attempts to enforce and implement those rights have resulted in irreconcilably inconsistent orders. The six states above have all ordered refunds for the excessive charges, while the ICC has denied the IPTA members this same relief. Subsequent to the ICC order denying refunds, the Michigan Public Service Commission ruled that SBC Michigan and Verizon (GTE) are required to refund to Michigan PSPs any charges that were found to be in excess of the new services test.³⁰ Yet the Massachusetts Department of Telecommunications and Energy later ruled not to grant refunds.³¹ Two courts in New York came to opposite conclusions on whether refunds were warranted.³²

There exists a significant outstanding legal controversy as to what are the PSPs' rights for established violations of the Commission's orders requiring that cost-based rates for network services be provided to PSPs. All PSPs' rights originate from the same Federal Act as

³⁰ *In the matter of the Complaint of Michigan Pay Telephone Association et al., against Ameritech Michigan and GTE North Incorporated*, MPSC No. U-11756 (After Remand), Order (March 16, 2004).

³¹ *Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the rate policy for operator service providers*, D.P.U./D.T.E. 97-88/97-18 (Phase II), Order (June 23, 2004).

³² *In the Matter of Independent Payphone Association of New York v. Public Service Commission of the State of New York and Verizon New York, Inc.*, 5 A.D.3d. 960, 774 N.Y.S.2d. 197 (2004).

interpreted and implemented by the Commission. Yet there are seriously inconsistent implementations of these identical rights from state to state.

Section 276 charged the Commission with promoting competition among payphone service providers and promoting the widespread deployment of payphone services to the benefit of the general public. There can be no reasonable debate about the payphone industry's struggles to maintain the widespread deployment of payphones. As found in the Commission's orders, the availability of cost-based services is fundamental to that goal. SBC Illinois' and Verizon's violations of the Commission's Payphone Orders undermines the goals the Commission is charged to promote. SBC Illinois and Verizon have collected hundreds of millions of dollars in dial around compensation since April 15, 1997. Yet, they deny the PSPs the refund needed to effectively provide the PSPs with the cost-based rates for this time period that are the carriers' prerequisite for receipt of such compensation. This illegal, inequitable, and unconscionable conduct flagrantly violates the very Commission requirements that it emphasized in its Payphone Orders. The Commission needs to clarify and resolve the outstanding question as to what are the consequences and remedies that attach to an ILEC's violations of the Payphone Orders.

The IPTA requests the Commission to grant this Petition for a Declaratory Ruling to resolve this outstanding controversy and to remove the uncertainty that exists with respect to enforcement of the Commission's orders regarding the charges for network services provided to payphone providers.

III. CONCLUSION.

The IPTA, on behalf of its members, respectfully petitions the Commission for a declaratory ruling as to the consequences and remedies available for an ILEC's violation of the

Commission's Payphone Orders requiring the provision by April 15, 1997 of network services to PSPs at cost-based rates that satisfy the new services test. The IPTA further requests a specific Commission declaratory ruling: 1) that the PSP members of the IPTA are entitled to refunds or reparations from SBC of the amounts SBC charged said IPTA members from April 15, 1997 through December 13, 2003, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test; 2) that the PSP members of the IPTA are entitled to refunds or reparations from Verizon of the amounts Verizon charged said IPTA members from April 15, 1997 through January 31, 2002, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test; 3) that the ICC decision denying the IPTA members refunds or reparations is inconsistent with the Commission's Payphone Orders and that the ICC should re-evaluate its denial of refunds or reparations to ensure compliance with the Commission's rulings; 4) whether SBC Illinois and Verizon were eligible to receive dial-around compensation for access code and toll free calls originating from their payphones on or before December 13, 2003 and January 31, 2002, respectively; and 5) for such other relief arising from the facts in ICC Docket No. 98-0195 as deemed necessary to enforce the Commission's Payphone Orders.

Respectfully submitted,

/s/

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July 30, 2004